



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER OF PATENTS AND TRADEMARKS  
Washington, D.C. 20231  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/874,446	06/04/2001	Brad Baker	30687-11	5829

5179 7590 04/10/2003

PEACOCK MYERS AND ADAMS P C  
P O BOX 26927  
ALBUQUERQUE, NM 871256927

EXAMINER
----------

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 04/10/2003

20

Please find below and/or attached an Office communication concerning this application or proceeding.

110

**Office Action Summary**

Application No.

09/874,446

Applicant(s)

BAKER, BRAD

Examiner

Robert Madsen

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-74 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-33 and 35-74 is/are rejected.
- 7) ☒ Claim(s) 34 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6,8,9.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Information Disclosure Statement*

1. The information disclosure statement filed August 26, 2001 (Paper No. 6) fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because no publication dates, or even a patent number, were provided with the following references "Baby Bottle Pop", "Magic Fizz Paint", "Fun Dip", and "Muecas". These particular references have not been considered as to the merits. Applicant is advised that the date of any re-submission of any item of information contained in this information disclosure statement or the submission of any missing element(s) will be the date of submission for purposes of determining compliance with the requirements based on the time of filing the statement, including all certification requirements for statements under 37 CFR 1.97(e). See MPEP § 609 ¶ C(1).

### *Claim Objections*

2. Claim 34 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 34 recites the body portion is non-edible, but the independent claim 33 recites edible, and thus claim 34 contradicts the independent claim.

***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 33-37 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The term "human like" in claim 33 is a relative term which renders the claim indefinite. The term "human like" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Furthermore, it is unclear what distinctions if any, are made between human-like and humanoid. For examination purposes "human like" is understood to be human shaped.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Art Unit: 1761

6. Claims 1,2,12-15,23-25,27,38,48-52,60-62,64 are rejected under 35

U.S.C. 102(a) as being anticipated by Professional Candy Buyer as evidenced by the Candy Ware House and the Lucasworld Websites.

7. Professional Candy Buyer teaches Sour Punker Pops are lollipops coated with powder in a reclosable plastic container (Page 3 of Website print out). As evidenced by the Candy Ware House and the Lucasworld Website, the Sour Punker Pops comprise a sugar-based lollipop and a sugar/ silicone dioxide/ flavor agent based powder, and one licks the lollipop, attached to a handle, and dips it into the powder in the container as recited in claims 1,2,12-15,23,25,27,38,48-52,60,62,64.

8. Claims 1,2,7,8,12-14,18-27,38,43,44,48-51,55-64,65,66,67 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Bobis (US 5354191).

9. See column 5, line 20 to column 6, line 54, column 7, line 20 to column 8, line 31 Examiner understands "head portion" of claim 65 to mean "any type of handle", as disclosed by applicant (Page 12, line 6).

10. Claims 1,7,8,22-26, 38,43,44,59-63,65 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Jessop (GB 2093433 A).

11. See Page 1, lines 3-5, lines 45 to 112. Examiner understands "head portion" of claim 65 to mean "any type of handle", as disclosed by applicant (Page 12, line 6).

Art Unit: 1761

12. Claims 1-3,7,8,12-14,18-26,38,39,43,44,48-51,55,56,59-63,65,66,70,71,74 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Conconi (WO 9918011).

13. See Abstract, Page 4, line 11 to Page 5, line 18, Figures.

14. Claims 1, 2,7-9,12-19,22-25,27,38,43-45,48-62,64-66, 68,70-72, are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Baker (WO 0019803).

15. Regarding claims 1, 38,65,70,71,see embodiments using a lid as in Figure 8. Regarding claims 2,12-19,22-25,48-62,66,67,74 , see Page 5, lines 5 to Page 6, line 9, Page 6, lines 24-30. Regarding claims 7-9, 43-45,68,72 see Page 15, lines 13 and 14 where the lids may be screw tops. Regarding claims 27 & 64 , see page 6, lines 15-18.

16. Claims 1,2,7-9,12-14,22-26, 38,43-45,48-51,59-63,65,66,68,70-72 are rejected under 35 U.S.C. 102(b) as being anticipated by Coleman (US 5370884)

17. Coleman teaches a container holding a powdered candy, a handle that is twisted onto the container and attached by a collar (i.e. items 28/20), and a hard candy carried by the handle and disposed within the container when coating the hard candy with the powdered candy as recited in claims 1,2,7-9,12-14,22-26, 38,43-45,48-51,59-63,65,66,68,70-72 (Abstract, Column 1, line 52 to Column 2,line 51).

18. Claims 1,7-11, 38,43-47 are rejected under 35 U.S.C. 102(e) as being anticipated by Manzone et al. (US 6159492).

19. Regarding claims 1,38 (See abstract in view of Figures 1 and 2). Regarding claims 7-11, 43-47, Manzone et al. teach press and turn threaded childproof

Art Unit: 1761

engagement which would include a tab and slot, requiring a twisting motion (Column 5, lines 25-30).

***Claim Rejections - 35 USC § 103***

20. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

21. Claims 3-6,39-42 rejected under 35 U.S.C. 103(a) as being unpatentable over Baker (WO 0019803) as applied to claims 1, 2,7-9,12-19,22-25,27,38,43-45,48-62,64-66, 68,70-72, above, further in view of Hart et al. (US 6054158).

22. Regarding claims 3-6,39-42 Baker teaches a coating utensil (i.e. a handle plus edible body portion) comprises the shape of a paintbrush, the shape of a human (i.e. vampire or mummy) or the shape of an alien (Page 6, lines 5-22). In the case of the paint brush, the design of the coating utensil is divided into a handle portion in the form of a brush handle and an edible body portion in the form of brush bristles, but Baker is silent in teaching the handle portion comprises the human head and edible body portion comprises a torso leg or arm, as recited in claims 3,4, 6,39,40, and 42 or the handle portions comprises an alien head as recited in claims 5 and 41. Hart et al. is relied on as evidence of providing a lollypop wherein the edible portion comprises a body part (i.e. an arm ) and the handle comprises a head (See Abstract and Figure 6).

Therefore, it would have been obvious to modify the brush of Baker such that the

Art Unit: 1761

handle portion comprises an alien head or human head with the edible portion comprises a leg, arm or torso, since Baker teaches a human and alien coating utensil design comprising a handle and edible portion and Hart et al. teach having a handle portion comprising a head and an edible portion comprising an arm. One would have been substituting one conventional handle and edible portion design for another.

23. Claims 10,11,46,47,69,73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baker (WO 0019803) as applied to claims 1, 2,7-9,12-19,22-25,27,38,43-45,48-62,64-66, 68,70-72 above, further in view of Manzone et al.

24. Baker teaches inserting the edible body portion into a lid, which may be a twist cap (page 15, lines 13 and 14),and thus disposing the edible body into the container and the handle above the container. Manzone et al. also teach an edible body extending into a container and attached to a lid, and further teaches press and turn threaded childproof engagement which would include a tab and slot, requiring a twisting motion (Abstracts, Figures 1 and 2, Column 5, lines 25-30). Therefore it would have been obvious to include tab and slot arrangements on the lid as recited in claims 10,11,46,47,69,73 since one would have been substituting one lid attachment design for another for the same purpose: twisting a lid onto a container such that an edible portion is disposed into the container.

25. Claims 28,29,31,33,35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baker (WO 0019803) in view of Hart et al. (US 6054158).



Art Unit: 1761

26. Regarding claims 28,29,3133,35, Baker teaches a coating utensil comprising a handle plus edible body portion is in the shape of a paintbrush, the shape of a human (i.e. vampire or mummy) or the shape of an alien (Page 6, lines 5-22). Baker teaches the handle includes a collar since the coating utensil is connected with the container by inserting the edible body portion into a lid, which may be a twist cap (page 15, lines 13 and 14), as recited in claims 31 and 35. Baker teaches the edible body is thus disposed within a container (e.g. via the lid of Figure 5) wherein the container comprises a flowable confectionery, as recited in claim 29, that the edible body is dipped into the confectionery (Page 5, lines 5 to Page 6, line 9, Page 6, lines 24-30). In the case of the paintbrush, the design of the coating utensil is divided into a handle portion in the form of a brush handle and an edible body portion in the form of brush bristles. However, Baker is silent in teaching a humanoid head is attached to the open end of the container and an edible humanoid body extends into the container, as recited in claims 28 and 33.

27. Hart et al. is relied on as evidence of providing a lollypop wherein the edible portion comprises a body part (i.e. an arm ) and the handle comprises a head (See Abstract and Figure 6). Therefore, it would have been obvious to modify the handle/edible body portion of Professional Candy Buyer such that the handle portion comprises a human head with the edible portion comprises human body portion, since one would have been substituting one known handle/edible body portion design for another for the same purpose.

Art Unit: 1761

28. Claims 32 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baker (WO 0019803) in view of Hart et al. (US 6054158) as applied to claims 28,29,31,33,35 above, further in view of Manzone et al. (US 6159492).

29. See the rejection of claims 10,11,46,47,69,73 above.

30. Claims 30 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baker (WO 0019803) in view of Hart et al. (US 6054158) as applied to claims 28,29,31,33,35 above, further in view of Coleman et al. (US 5913453)

31. Baker is silent in teaching a flowable confection also in the head portion.

However, it was known in the art to provide a flowable confection within the handle supporting a lollipop such as in Coleman et al. ('453 (Abstract, Column 1, lines 25-42, Figures). Therefore to further include a flowable confection within the head, or handle portion, of Baker would have been an obvious matter of design choice, since it was known to include flowable confections in the handle of a lollipop and one would have been substituting one type of lollipop handle for another.

### ***Double Patenting***

32. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

33. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Art Unit: 1761

34. Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

35. Claims 1,2,20-27, 38,48,57-67,70,71,74 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1-7 of '447 differ only from the present application by a claiming specific shape (i.e. a soda bottle shape, which has a cylinder shape as recited in claims 27 and 64).

36. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

37. Claims 3-6,12-19, 49-54, are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 as applied to claims 1,2,20-27, 38,48,57-67,70,71,74, further in view of Baker (WO 0019803).

38. Regarding claims 12-19, 49-54, '447 does not claim any particular candy and flowable confectionery composition. Baker teaches the recited candy and flowable confectionery compositions claims 12-19, 49-54, (See claims 1-20, Page 5, line 5 to Page 6, line 2). Therefore, it would have been obvious to form the candy and flowable confectionery from the recited compositions since one would have been substituting one candy and flowable confectionery composition for another for the same purpose.

Art Unit: 1761

39. Regarding claims 3-6, 39-42, '447 claims the handle, or upper portion, and lower portion are shaped as a bottle but does not claim a head, human head, alien as a handle portion or a torso/arm/leg as body portion Baker further teaches human and alien shapes edible portions and teaches human shapes for the container (Page 6, lines 15-22). Therefore it would have been obvious to modify the bottle container of '447 and include a human head or alien head for the handle portion since (1) '447 claims the entire container is in the shape of a particular object (i.e. a bottle) and (2) Baker teaches containers in a human or alien shape. It would have also been obvious to select any human edible portion shape since Baker teaches human shape edible portions.

40. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

41. Claims 7-11, 43-47, 68, 69, 72, and 73 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 as applied to claims 1, 2, 20-27, 38, 48, 57-67, 70, 71, 74, further in view of Manzone et al. (US 6159492).

42. '447 does not claim any particular means for attaching the upper and lower portions as recited in claims 7-11, 43-47, 68, 69, 72, and 73. Manzone et al. teach a bottle shape with pressing and twisting an upper portion (e.g. a releasable lockable childproof cap in Column 2, lines 20-55) with a edible candy disposed into a lower portion. Therefore, it would have been obvious to include the recited twisting/locking structure with a tab slot (a child proof structure with pressing and twisting) since one would have

been substituting one method of attaching the upper portion comprising a hard candy to the lower portion of a bottle. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

43. Claim 28-30,33,34, and 37 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims1-7 of copending Application No. 09/874,447 in view of Baker (WO 0019803).

44. See the rejection of claims 1-4,6, 7,12,20, and 24. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

45. Claim 31,32 ,35, and 36 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims1-7 of copending Application No. 09/874,447 in view of Baker (WO 0019803), as applied to claims 28-30,33,34, and 37, further in view of Manzone et al. (US 6159492).

46. See the rejection of claims 9 and 10 above. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

47. Claims 1,2,7-27,38,43-64,65-74 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims1-60 of copending Application No. 09/874,440. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1-60

of '440 differ from the present application claims 1,2,7-27,38,43-64,65-74 by shape only (i.e. a bottle shape which has a cylinder shape as recited in claims 27 and 64). This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

48. Claims 3-6,39-42 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-60 of copending Application No. 09/874,440 as applied to claims 1,2,7-27,38,43-64,65-74 further in view of Baker (WO 0019803).

49. Regarding claims 3-6, 39-42, '440 claims the handle, or upper portion, and lower portion are shaped as a bottle but does not claim a head, human head, alien as a handle portion or a torso/arm/leg as body portion. Baker teaches human and alien shapes edible portions and teaches human shapes for the container (Page 6, lines 15-22). Therefore it would have been obvious to modify the bottle container of '440 and include a human head or alien head for the handle portion since (1) '447 claims the entire container is in the shape of a particular object (i.e. a bottle) and (2) Baker teaches containers in a human or alien shape. It would have also been obvious to select any human edible portion shape since Baker teaches human shape edible portions. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

50. Claim 28-37 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-60 of copending Application No. 09/874,440 in view of Baker (WO 0019803).

Art Unit: 1761

51. See the rejection of claims 1-4,6, 7,9,10,12,20, and 24. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### **Conclusion**


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Palmer et al. (US 6383536 B1) teach alien shaped confectioneries, Lasher (US D104724) teaches human head shaped confectionery, Josephsohn (US D69277) teaches human body shaped confectionery, Levay US 5666693 teaches character simulated lollipop handles, and Lowenstein (US D 119,275) teaches human body shaped confectionery handle.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist at (703) 308-0061.

Robert Madsen  
Examiner  
Art Unit 1761  
March 31, 2003

  
**STEVE WEINSTEIN**  
PRIMARY EXAMINER 1761  
for M. Cano